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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

In re:	Case No. 09-29162-D-11
SK FOODS, L.P.,	Docket Control No. MG-5
Debtor.	Date: March 30, 2011 Time: 10:00 a.m. Dept: D

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION

On March 2, 2011, the law firm of Trepel McGrane Greenfield LLP ("TMG"), filed a final application for compensation and expense reimbursement (the "Motion") for services rendered as special counsel to the chapter 11 trustee in this case, Bradley D. Sharp (the "trustee").[1] For the reasons set forth below, the court will grant the Motion in part.

I. THE POSITIONS OF THE PARTIES

TMG seeks final approval of $301,409.64 in fees and $92,951.79 in costs for the period October 1, 2009 through December 31, 2010, a total of $394,361.43, of which $50,133.70 has previously been approved on an interim basis. TMG relies on the language of (1) its engagement agreement with the trustee,

1. Unless otherwise indicated, all Code, chapter, and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All Rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

(2) the trustee's application to employ TMG, (3) the supporting declaration of Christopher D. Sullivan, and (4) the order granting the Application,[2] and on 11 U.S.C. § 328(a) in seeking a contingency fee in the amount of $301,409.64, representing 20% of the net recovery on the estate's claims against B&G Foods, Inc. ("B&G"). TMG's requested costs include $84,425 billed to TMG by the law firm of Stutman, Treister & Glatt PC ("Stutman") for representing TMG in objecting to a motion to approve the trustee's settlement with B&G.

Both the contingency fee and the Stutman fees are in contention: the trustee objects to allowance of the Stutman fees, but not the contingency fee; the Official Committee of Unsecured Creditors (the "Committee") objects to the Stutman fees and the contingency fee, contending TMG should be allowed fees on an hourly basis based on the rates set forth in the Engagement Agreement; the Bank of Montreal ("BMO") requests that the Motion be denied in its entirety. The Committee objects to payment of any compensation from the debtor's estate, contending BMO should be responsible for payment. BMO disagrees.

II. ANALYSIS

This court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding

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2. See Application for Order Authorizing Employment of McGrane Greenfield LLP as Special Counsel to the Trustee, filed November 16, 2009 (the "Application"); Declaration of Christopher D. Sullivan in support of the Application, filed November 16, 2009 (the "Sullivan Declaration"); Master Agreement for Year 2009 Legal Services, Exhibit A to the Sullivan Declaration (the "Engagement Agreement"); Order Approving and Authorizing Employment of McGrane Greenfield LLP as Special Counsel to the Trustee, filed December 23, 2009 (the "Employment Order").

under 28 U.S.C. § 157(b)(2)(B).

A. The Contingency Fee Was Approved Under § 328(a)[3]

1. Standards for Approval of Compensation of Professionals

Sections 328 and 330 create "a two-tiered system" for approval of the terms of a professional's employment and compensation. Riker, Danzig, Scherer, Hyland & Perretti v. Official Comm. of Unsecured Creditors (In re Smart World Techs., LLC), 552 F.3d 228, 232 (2nd Cir. 2009). Under § 330, the court reviews the requested compensation after the services have been performed to determine whether the compensation is reasonable considering the nature, extent, and value of the services. By contrast, § 328(a) permits the court to "pre-approve" particular terms and conditions of employment as reasonable, and thereby "forgo a full post-hoc reasonableness inquiry." Id.

If the court pre-approves the terms and conditions under § 328(a), it may thereafter allow different compensation only if those terms and conditions "prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." Id., quoting § 328(a).

> These two inquiries are mutually exclusive, as ". . . a bankruptcy court may not conduct a § 330 inquiry into the reasonableness of the fees and their benefit to the estate if the court already has approved the professional's employment under 11 U.S.C. § 328."

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3. BMO is the only party that contends the contingency fee was not approved under § 328(a), and thus, remains subject to approval under § 330. BMO and the Committee both contend that, even if the fee was approved under § 328(a), it would be improvident to allow it in light of developments not capable of being anticipated at the time it was approved. This latter argument will be addressed below.

Id., at 232-33, quoting Friedman Enters. v. B.U.M Int'l, Inc. (In re B.U.M. Int'l, Inc.), 229 F.3d 824, 829 (9th Cir. 2000); see also In re First Magnus Fin. Corp., 2009 Bankr. LEXIS 4534, *23 (9th Cir. BAP 2009) ["§§ 328(a) and 330 reflect very different approaches to court review and approval of professional compensation. Correspondingly, approval of a professional's employment under the terms of either § 328(a) or § 330 legally limits the application of the other provision."].

Thus, the crux of the matter here is whether, on the one hand, the court pre-approved TMG's contingency fee under the first sentence of § 328(a), so as to limit further inquiry to an "improvident in light of developments" review under the second sentence, or, on the other hand, left open the possibility of further review of the reasonableness of the contingency fee under § 330.

The applicable test in the Ninth Circuit is set forth in Circle K Corp. v. Houlihan, Lokey, Howard & Zukin, Inc. (In re Circle K Corp.), 279 F.3d 669 (9th Cir. 2001):

> We hold that unless a professional's retention application unambiguously specifies that it seeks approval under § 328, it is subject to review under § 330. As a matter of good practice, the bankruptcy court's retention order should likewise specifically confirm that the retention has been approved pursuant to § 328 so as to avoid any ambiguity. The absence of such a specific reference in the bankruptcy court's order, however, would not of itself automatically override the retention application's invocation of § 328.

279 F.3d at 671.

2. Procedural Background of TMG's Employment

On November 16, 2009, the trustee filed the Application, in which he sought to employ TMG (then known as McGrane Greenfield

LLP) as his special counsel for the purpose of prosecuting claims to collect certain accounts receivable. This was a garden-variety application to employ counsel for a bankruptcy trustee, indicating only that the trustee sought to employ McGrane Greenfield "on the basis of [its] experience and knowledge in prosecuting claims for money damages in bankruptcy-related litigation," that McGrane Greenfield is competent and skilled in those matters, and that its attorneys have substantial experience in providing legal services. The trustee did not set the Application for hearing.

In light of the trustee's earlier and ongoing employment of Schnader Harrison, a large and sophisticated law firm, as his general bankruptcy counsel, the court questioned the need for special counsel to perform what appeared to be garden-variety collection work, and therefore, required the trustee to set the matter for hearing. The trustee set the Application for hearing and served a notice of hearing on the Office of the United States Trustee, parties requesting special notice in this case, and a "core group" of creditors and attorneys, including the various counsel for the debtor, the Committee, Scott Salyer and related entities, and BMO.

No party opposed the Application or sought clarification of the terms and conditions of the proposed employment. At the hearing, the court expressed its concerns about the trustee's apparent need to farm out what appeared to be basic collection work and questioned the terms of compensation, proposed to be the greater of fees on hourly basis or a 20% contingency fee. Counsel responded that the work was expected to be not so

straightforward, but could involve setoff rights; he emphasized that the proposed hourly rates were lower than those normally charged by McGrane Greenfield. As further clarification, the trustee alluded to complex antitrust issues in the B&G matter. He stated he had discussed the compensation arrangement with the debtor's secured lenders -- presumably BMO as agent for the major secured lenders -- and suggested they had approved the arrangement.[4] BMO did not appear at the hearing. As further discussed below, the court granted the Application. No party asked to approve the form of the Employment Order or objected to the order after it was entered.

3. The Documents Evidencing the Terms of TMG's Employment

The Application stated that the trustee sought to employ McGrane Greenfield "on the terms and conditions stated in [the Engagement Agreement]." Application, at ¶9. The Engagement Agreement, in turn, set forth the hourly rates to be charged, and stated, "Subject to Bankruptcy Court approval under section 328(a)," the trustee would pay McGrane Greenfield the greater of (1) the fees charged by the hour at those hourly rates, plus costs, or (2) a fee equal to 20% of the amounts recovered (net of costs) in the collection matters on which McGrane Greenfield was retained, including the B&G matter. Engagement Agreement, at ¶¶3, 4. In his declaration, Christopher D. Sullivan stated,

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4. "I've discussed this with the secured lenders. They had some feedback on the first proposal, and this is the subsequent proposal that we're going forward with that, I think, meets everybody's needs." Declaration of Christopher D. Sullivan in Support of Trepel McGrane Greenfield LLP's Omnibus Reply to Objections to Its Final Application for Compensation and Expense Reimbursement, Ex. A, at 6.

> McGrane Greenfield LLP agrees to be employed under the terms and conditions stated in the [Engagement Agreement]. McGrane Greenfield LLP agrees that all professional fees and payment of invoices are subject to bankruptcy court approval under 11 U.S.C. §§ 327 and 328.

Sullivan Declaration, at ¶6. The Employment Order states, "All fees are subject to further court approval and subject to Sections 327 and 328(a) of the Bankruptcy Code." Employment Order, at 2:15-16.

4. Conclusions

The court concludes that the Employment Order constituted a pre-approval of the "greater of" the hourly or contingency fee arrangement, thus foreclosing an examination of the contingency fee for reasonableness under § 330.

With the exception of the Application, all the relevant documents referred to § 328(a); neither the Application nor any of the other documents referred to § 330. The Sullivan Declaration stated unambiguously that McGrane Greenfield LLP (1) agreed to be employed under the terms and conditions stated in the Engagement Agreement, and (2) agreed that all professional fees and payment of invoices would be "subject to bankruptcy court approval under 11 U.S.C. §§ 327 and 328." The Engagement Agreement, in turn, twice referred to McGrane Greenfield's compensation as being "subject to Bankruptcy Court approval under Section 328(a)" -- once in the paragraph setting forth the hourly rates and again in the paragraph setting forth the "greater of" arrangement, which included the contingency fee.

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The Employment Order states, "All fees are subject to further court approval and subject to Sections 327 and 328(a) of the Bankruptcy Code." In the court's view, this second clause, together with the specific references to § 328(a) in the Sullivan Declaration and the Engagement Agreement and the absence of any reference to review under § 330, concludes the matter. As noted above, in terms of the review of fees, §§ 328(a) and 330 are mutually exclusive; thus, if it was the intention of the parties or the court to review TMG's compensation under § 330 after its services were performed, there would have been no need to state in the order that the fees would be subject to review under § 328(a).

As discussed above, the court had its own concerns about the Application and required notice and a hearing for the very purpose of giving the interested parties an opportunity to present any opposition. BMO and the others received notice of the hearing, and were plainly made aware that McGrane Greenfield was agreeing to be retained subject to § 328(a). Given BMO's security interest in virtually all the debtor's assets, including the B&G receivable, BMO had every incentive to ensure, if it so chose, that McGrane Greenfield's fees would instead be subject to review under § 330. BMO was apparently satisfied with the arrangement at the time; indeed, the trustee suggested at the hearing that alternatives had been discussed with the secured lenders and this arrangement appeared to meet everyone's needs. BMO did not oppose the Application or seek clarification or modification of the terms of the employment, and did not object to the form of the Employment Order. It will not be heard to do

so now.[5]

In these circumstances, this court is not free to review the contingency fee under § 330 reasonableness standards, but only to determine if it was improvident in light of developments not capable of being anticipated at the time it was approved.[6]

B. Subsequent Events Were Capable of Being Anticipated

Where a fee arrangement has been approved in advance under § 328(a), the court may vary it later only "if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." § 328(a); Circle K Corp., 279 F.3d at 671; In re Confections by Sandra, Inc., 83 B.R. 729,

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5. At least twice, BMO quotes the Employment Order as stating that "[a]ll fees are subject to further court approval." BMO concludes from this language that "any claimed reliance on Section 328(a) to avoid scrutiny of the contingency fee is misplaced." Objection of Bank of Montreal as Agent for the Secured Lenders to the Final Fee Application of Trepel McGrane Greenfield LLP and Expense Reimbursement, filed March 16, 2011 ("BMO Objection"), at 5. It is significant that BMO puts the period after the word "approval" and omits the second clause of the sentence: "and subject to Sections 327 and 328(a) of the Bankruptcy Code." BMO clearly seeks to re-write the Employment Order.

Similarly, the opposition fails to address the fact that the Sullivan Declaration and the Employment Agreement unambiguously expressed McGrane Greenfield's agreement to be employed subject to § 328(a), as required by Circle K Corp. BMO simply has no response to the conclusion that the documents, as written, were intended to result in employment and compensation under § 328(a).

6. This conclusion forecloses BMO's arguments that TMG's services did not confer an actual benefit on the estate and that the contingency fee is not reasonable. These arguments and the cases cited, Rubner & Kutner, P.C. v. United States Trustee (In re Lederman Enterprises, Inc.), 997 F.2d 1321 (10th Cir. 1993), Ferrara & Hantman v. Alvarez (In re Engel), 124 F.3d 567 (3rd Cir. 1997), and In re Yermakov, 718 F.2d 1465 (9th Cir. 1983), pertain to a § 330 analysis where there has been no pre-approval under § 328(a).

731 (9th Cir. BAP 1987). "The term 'unanticipated developments' is subject to a broad interpretation," but "the standard is high." Ezra | Brutzkus | Gubner LLP v. Integrated Knowledge Marketing, Inc. (In re Integrated Knowledge Marketing, Inc.), 2007 Bankr. LEXIS 4845 *27-28 (9th Cir. BAP 2007), citations omitted.

It is important to recognize that the question is not whether the subsequent events were anticipated, but whether they were capable of being anticipated. In re Barron, 225 F.3d 583, 586 (5th Cir. 2000). Thus, in applying the test to the particular facts before it, one court found each of these developments to have been capable of being anticipated: that the recovery was of an unexpectedly significant amount, that the case proved to be a "slam dunk," and that collection proved relatively easy. Daniels v. Barron (In re Barron), 325 F.3d 690, 693-94 (5th Cir. 2003).

In Integrated Knowledge Marketing, the Ninth Circuit Bankruptcy Appellate Panel found that the fee applicants were "sophisticated, experienced, and knowledgeable law firms with extensive experience in bankruptcy law," such that they could be expected to have foreseen that the adversary defendants would either purchase or successfully object to most, if not all, the claims against the estate and then get the underlying bankruptcy case dismissed. Integrated Knowledge Marketing, 2007 Bankr. LEXIS 4845, at *28.

In the present case, first, all the parties involved in this dispute have been represented by experienced and sophisticated attorneys, most with an extensive background in bankruptcy law.

Second, from the commencement of the case, BMO has asserted a lien in virtually all the assets of the estate, including accounts receivable such as the B&G receivable. As such, BMO has been as active a participant in this case as the trustee; in essence, they have been co-quarterbacks. Because of BMO's lien against the B&G receivable, the claim could not have been settled without BMO's consent. It is simply not credible that the parties could not have foreseen that BMO would play a significant role in resolving the claim.

BMO now contends that B&G's counterclaim "chilled the enthusiasm of TMG and caused a litigation stalemate,"[7] which required BMO to step into the breach and settle the case. These developments, according to BMO, were not capable of being anticipated. As supporting evidence, BMO's Lawrence Mizera suggests that B&G filed the counterclaim "as a result" of the wide-ranging claims asserted in TMG's complaint against it.[8] He also testifies, "When B&G filed its antitrust counterclaims, TMG could not identify any apparent remedy or defense, and their enthusiasm seemed to cool for pursuing these claims." Mizera Declaration, at ¶9. He adds that

> [t]he myriad of theories asserted by TMG and the complex nature of the counterclaim of B&G, especially the antitrust and unfair trade practices allegations, resulted in a virtual standoff between the litigants. Protracted and costly litigation appeared likely.

<u>Id.</u> at ¶10.

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7. BMO Objection, at 6.

8. Declaration of Lawrence Mizera in support of BMO Objection, filed March 16, 2011 ("Mizera Declaration"), ¶¶8, 9.

First, it is unlikely the parties did not anticipate the filing of the counterclaim in the adversary proceeding given that B&G had filed a $3.5 million proof of claim against the estate two months before the trustee retained McGrane Greenfield. Second, BMO's position would require the court to accept Mizera's broad-reaching speculations as fact -- that B&G would not have filed a counterclaim had TMG included fewer or less sweeping claims in its complaint, that TMG was not up to the task of defending against the counterclaim, and that the negotiations with B&G reached an impasse that only BMO could break. This is exactly the sort of second-guessing a professional seeking a degree of certainty in being employed under § 328(a) may reasonably expect to be protected from. Finally, while BMO and/or the other parties may not have anticipated these developments (to whatever extent they occurred), all these things, including that "[p]rotracted and costly litigation appeared likely" and that BMO would become heavily involved in the negotiations, were surely capable of being anticipated.

As no party has shown there were developments not capable of being anticipated at the time the contingency fee arrangement was approved, the court has no basis on which to revisit it.

C. TMG Is Not Entitled to Reimbursement of the Stutman Fees

TMG contends it was forced to hire Stutman "as a consultant under ¶6c of the Engagement Letter to 'aid [TMG] in representing [Trustee].'" Motion, at 11. Paragraph 6(c) of the Engagement Agreement provides that the trustee will pay the fees and charges of expert witnesses, consultants and investigators.

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There is no credible interpretation of the Engagement Agreement under which reimbursement of the Stutman fees may be allowed. First, ¶6(c) states that TMG will select such consultants "in consultation with [the trustee]." In contrast, TMG engaged the Stutman firm on its own, without consulting with the trustee. Second, it appears the Stutman fees were incurred solely to aid TMG in defending its own interests, not "to aid in representing [the trustee]," as required for reimbursement under ¶6(c). TMG itself states it retained Stutman because a conflict of interest had arisen between TMG and the trustee.

TMG cites the Wind N' Wave case for the proposition that fees and expenses incurred in securing an attorney's fee award may be recovered in some instances. See North Sports, Inc. v. Knupper (In re Wind N' Wave), 509 F.3d 938, 943-44 (9th Cir. 2007), citing Smith v. Edwards & Hale (In re Smith), 317 F.3d 918, 928 (9th Cir. 2002). The court acknowledges the holding of these cases that the time and expenses of litigating a fee award are compensable where (1) the services performed satisfy the requirements of § 330(a)(4)(A), and (2) the case "exemplifies a 'set of circumstances' where the time and expense incurred by the litigation is 'necessary' within the meaning of section 330(a)(1)." Smith, 317 F.3d at 928.

TMG contends it was forced to engage the Stutman firm for two reasons -- first, that TMG itself was incapable of defending its contingency fee.

> TMG is simply not a transactional bankruptcy firm. Rather, TMG is a civil litigation firm with a bankruptcy orientation. Because of this fact, TMG needed to call on Stutman's expertise to unwind the complicated circumstances it was being exposed to when

> the Trustee and BMO entered into an independent settlement agreement that raised an obstacle to TMG's recovery of its fees.[9]

Second, Christopher Sullivan, TMG's lead counsel on this case, was too busy with a $100 million jury trial to be able to deal with BMO's opposition to the B&G settlement motion.

The court rejects these arguments. The court is sufficiently familiar with the nature of the contingency fee dispute to easily conclude that the decision to engage the Stutman firm was a choice TMG made on its own and for its own benefit. The request for reimbursement of the Stutman fees is simply a case of overreaching.[10]

D. Approved Fees and Costs Will Be Paid By BMO

The trustee, the Committee, and TMG contend TMG's fees and costs are payable from the proceeds of the B&G settlement, and that since those proceeds have been distributed to BMO, payment should be made by BMO. BMO contends TMG's compensation, if any, should be allowed as an administrative claim against the estate. The following background is pertinent to this dispute.

According to a status conference statement filed in the trustee's adversary proceeding against B&G, Adv. No. 10-2166, the litigation had been settled sometime before August 27, 2010. One

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9. Trepel McGrane Greenfield LLP's Omnibus Reply to Objections to Its Final Application for Compensation and Expense Reimbursement, at 4.

10. The court also rejects TMG's argument that the Stutman representation benefitted the estate because "Stutman's efforts ultimately resulted in the Trustee's being able to settle with both BMO and B&G on terms satisfactory to all of the Trustee, TMG and BMO." Motion, at 11. The matter of the contingency fee was <u>not</u> resolved by Stutman's involvement; it was merely reserved for another day.

month later, on September 29, 2010 (before the motion to approve the B&G settlement was filed), the trustee filed a motion to approve a broad-ranging compromise with BMO pursuant to which, among other things, the trustee would transfer to BMO the debtor's accounts receivable and litigation related to those accounts receivable. The motion did not mention B&G or the pending adversary proceeding or in any way indicate that the B&G receivable or the B&G litigation was excluded from the transfer provision of the compromise.[11]

The settlement agreement memorializing the BMO compromise provided that the trustee would cooperate with BMO in realizing on the accounts receivable and that the costs and expenses of pursuing recovery would by borne solely by BMO. The B&G receivable was not excluded from these provisions.[12] The settlement agreement did not mention the adversary proceeding against B&G.

Thus, although the issue of the source of payment of TMG's compensation was clearly in play and must have been a point in issue when the parties negotiated the BMO global compromise, they left it unaddressed. The issue first surfaced when TMG filed the trustee's motion to approve the B&G compromise on October 7,

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11. Several months earlier, in May 2010, the trustee, the Committee, and BMO had proposed a joint plan of liquidation containing virtually identical terms with respect to the debtor's accounts receivable. Again, there was no mention of the B&G receivable, although it was clearly in play at that time. (TMG had commenced the adversary proceeding against B&G on March 25, 2010.)

12. The joint plan contained virtually identical provisions -- the trustee would cooperate with BMO's collection efforts; BMO would bear the costs. The plan did not mention the B&G receivable or purport to exclude it from these provisions.

2010, and BMO filed a limited objection to that motion on October 27, 2010. TMG then raised the issue in connection with the motion to approve the BMO compromise by way of a joint limited objection to that motion and response to BMO's limited objection to the B&G settlement, filed November 22, 2010.[13]

The parties did not ask the court to resolve the issue in connection with either the motion to approve the BMO compromise or the motion to approve the B&G settlement, but simply decided to reserve their rights on the issue. They did not undertake to modify the terms of either compromise and did not address the issue further in connection with either motion. The court then issued a memorandum decision addressing the opposition of the Salyer entities to the BMO compromise, and granted the motion -- a motion that informed creditors that accounts receivable would be transferred to BMO, with BMO to bear the associated costs. The court finds no reason to make an after-the-fact exception for the B&G receivable.

The court recognizes that BMO apparently became dissatisfied with TMG's efforts and decided to substitute its own. However, that factor is outweighed by the facts that (1) the trustee's

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13. On November 24, 2010, BMO filed a response to TMG's joint limited objection and response, in which BMO argued <u>only</u> that the joint limited objection should not be considered because it had not been filed timely under the briefing schedule set by the court at the October 27, 2010 hearing. On December 1, 2010, TMG filed a response, pointing out that it had had no reason to suspect a problem with the BMO compromise until after the October 27 hearing had been concluded, and thus, had not attended the hearing. As a result, TMG had not been aware of the briefing schedule, and had filed its joint limited objection by the deadline that would have applied under LBR 9014-1.

In its November 24, 2010 response, BMO chose not to address the issue of the contingency fee on its merits.

global compromise with BMO and the various components of consideration given on both sides included a transfer of accounts receivable to BMO, with BMO to bear the associated costs of realizing on them, (2) creditors were not informed that an exception would be made for the B&G receivable, and (3) BMO received the entire benefit of the receivable. The court notes again that BMO was aware of the terms of the trustee's employment of McGrane Greenfield at the time those terms were approved and had every incentive and opportunity to object or to negotiate some other arrangement.

The court resolves this issue without reference to the apparent waiver of § 506(c) surcharge rights in the final cash collateral order or to the "waiver of the waiver" alleged by TMG. This is simply a matter of accounts receivable and the litigation related to them having been transferred to BMO as part of the global settlement.[14] Having received the benefits, BMO will not be permitted to transfer back to the estate the burdens associated with that litigation.

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14. Indeed, BMO seems to have believed the transfer had already occurred and that BMO was in a position to resolve the B&G litigation without reference to the interests of TMG, the estate, or creditors:

> The Settlement Agreement [with B&G] is silent as to any legal fees that the Estate may owe by reason of the settlement and does not purport to cover that topic. That was the understanding of the parties, and prior to executing the Agreement, [BMO] specifically articulated its position that the Agreement did not cover the issue of any administrative expenses the Estate might owe as <u>these were not issues for [BMO] or B&G</u>.

Limited Objection and Reservation of Rights of Bank of Montreal as Agent for the Secured Lenders Regarding Plaintiff's Motion to Approve Settlement With B&G Foods, Inc., filed October 27, 2010, at 4, emphasis added.

III. CONCLUSION

For the reasons discussed above, the court will grant the Motion in part. TMG's request for a contingency fee in an amount equal to 20% of the recovery obtained in the B&G settlement, net of costs, will be granted. TMG's request for reimbursement of costs, with the exception of the request for reimbursement of the Stutman fees, will be granted. TMG's request for payment from the proceeds of the B&G settlement will be granted, and BMO will be directed to pay the approved fees and costs.

The amounts that will be approved are calculated as follows:

Gross recovery from B&G		$1,600,000.00
Less TMG costs		7,363.59[15]
Net recovery from B&G		1,592,636.41
Contingency fee equal to 20%	$	318,527.28
Less fees previously advanced	$	48,693.36
Balance due on contingency fee	$	269,833.92
Plus balance due on TMG costs		5,923.25[16]
Balance due on contingency fee & costs	$	275,757.17

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The court will issue an appropriate order.

Dated: April 14, 2011

Robert Bardwil
ROBERT S. BARDWIL

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15. This figure is, in turn, calculated as follows. The Motion states that the total billed by Stutman was $84,425. However, that figure represents only the fees billed by Stutman, and not the costs, $1,163.20. Thus, the total billed by Stutman, as reflected on the last page of TMG's Exhibit 3, was $85,588.20. Deducting that figure from the total costs incurred by TMG, $92,951.79, leaves $7,363.59.

16. Total TMG costs, $7,363.59, less amounts previously advanced, $1,440.34.

CERTIFICATE OF MAILING

I, Andrea Lovgren, in the performance of my duties as Deputy Clerk to the Honorable Robert S. Bardwil, caused to be mailed by ordinary mail a true copy of the attached document to each of the parties listed below:

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DATE: April 14, 2011

Andrea Lovgren
Deputy Clerk